Supreme Court, U.S.
FILED

99 235 JUL 29 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; and SOCORRO SOZA,

Petitioners,

v.

ITT CORPORATION, a Delaware corporation, dba ITT CANNON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ADAM LEVINE
Counsel of Record
DANIEL MARKS
302 E. Carson, #702
Las Vegas, Nevada 89101
(702) 386-0536

JACK LEVINE
1144 East Jefferson Street
Phoenix, Arizona 85034
(602) 254-6044

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

32 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where a party fails to demand a trial by jury within the time limits provided by Rule 38(d) F.R.C.P., but thereafter requests a trial by jury, does the Court have discretion, under Rule 39 (b) F.R.C.P., to deny such a request, in the absence of compelling circumstances supporting such a denial?

2. In the absence of substantial prejudice to other parties or interference with the administrative scheduling concerns of the Court, is it a violation of the Seventh Amendment for a Court to deny a party's Rule 39(b) motion for a jury trial?

3. What standard should be applied by a court in weighing a late request for a jury trial under Rule 39(b) F.R.C.P.?

4. If Rule 39(b) F.R.C.P. is not to be construed to generously grant relief for an inadvertent waiver, does Rule 38(d) F.R.C.P., violate the Constitution by providing for the loss of the Seventh Amendment right to trial by jury in civil cases, without a knowledgeable, affirmative waiver of such right?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

CITATION OF OPINIONS BELOW 1

BASIS FOR JURISDICTION IN THIS COURT 1

CONSTITUTIONAL PROVISION AND RULES INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 5

I. The decisions of the various circuits are in conflict regarding the standard for granting relief under Rule 39(b) 6

II. The waiver of a Constitutional right should be a knowledgeable waiver and not an unintentional or inadvertent one 7

III. A waiver of a Constitutional right must be by clear and compelling evidence 8

IV. Rule 39(b), when reasonably construed, can prevent inadvertent waivers 9

V. Uniform guidelines for Rule 39(b) should be established by this Court 10

CONCLUSION 11

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

AMF Tuboscope, Inc. v. Cunningham, 352 F.2d 150 (10th Cir. 1965) 6, 9

Baker v. Amtrak Corp., 163 F.R.D. 219 (D.C. N.Y. 1995) 7

Beckham v. Safeco Ins. Co., 691 F.2d 898 (9th Cir. 1982) 6

Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1984) 6

Cascone v. Ortho Pharmaceutical Corp., 702 F.2d 389 (2nd Cir. 1983) 6

Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) 6

Credit Bureau of Council Bluffs v. Credit Bureau Data Centers, Inc., 143 F.R.D. 206 (Iowa, 1992) 7

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2d 1094 (1967) 8

D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed. 2d 124 (1972) 8

Davis Oil Co. v. Mills, 873 F.2d 774 (5th Cir. 1989) 8

E.E.O.C. v. Britrail Travel Int'l Corp., 129 F.R.D. 116 (D.C. N.J. 1989) 7

Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed. 2d 378 (1981) 8

Erie Telecommunications, Inc. v. City of Erie, Pennsylvania, 853 F.2d 1084 (3rd Cir. 1988) 8

TABLE OF AUTHORITIES – Continued

Page

Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975) 8

Ford v. Breier, 71 F.R.D. 195 (D.C. Wis. 1976) 7

Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972) 8

Gamboa v. Medical College of Hampton Roads, 160 F.R.D. 540 (D.C. Va. 1995) 7

Gelardi v. TransAmerica Occidental Life Insurance Co., 163 F.R.D. 495 (D.C. Va. 1995) 7

General Tire and Rubber Co. v. Watkins, 331 F.2d 192 (4th Cir. 1964) 6

Goff v. Owen Healthcare, Inc., 166 F.R.D. 492 (D.C. Kan. 1966) 7

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) 8

Kotsilieris v. Chalmers, 966 F.2d 1181 (7th Cir. 1992) 6

Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985) 6, 9

Lewis v. Time, Inc., 710 F.2d 549 (9th Cir. 1983) 6

Loiselle v. Gladfelter, 160 So.2d 740 (Fla. 1964) 9

Mardesich v. Marciel, 538 F.2d 848 (9th Cir. 1976) 6

Megadyme Medical Prods. v. Aaron Medical Indus., 170 F.R.D. 28 (D.C. Utah 1996) 7

Merritt v. Faulkener, 697 F.2d 761 (7th Cir. 1983) ...6, 9

Milliken and Co. v. Shaw Indus., Inc., 978 F.Supp. 1155 (D.C. Ga. 1997) 7

TABLE OF AUTHORITIES – Continued

Page

Miranda v. State of Arizona, 86 S.Ct. 1602, 384 U.S. 436, 16 L.Ed. 2d 694 (1966) 8

Noonan v. Cunard S.S. Co., 375 F.2d 69 (2nd Cir. 1967) 6

Ostlund v. Bobb, 825 F.2d 1371 (9th Cir. 1987) 8

Pacific Queen Fisheries v. Symes, 307 F.2d 700 (9th Cir. 1962) 6

Parrott v. Wilson, 707 F.2d 1262 (1983) 10

Patterson v. Illinois, 487 U.S. 285, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988) 8

Patterson v. McNeill – Patterson & Assoc., Inc., 441 S.E.2d 328 (S.C. App. 1994) 8, 9

Pinemont Bank v. Belk, 722 F.2d 232 (5th Cir. 1984) 6

REW Construction Co. v. District Court of Third Judicial Dist., 400 P.2d 390 (Idaho 1965) 9

Rodgers v. United States Steel Corp., 536 F.2d 1001 (3rd Cir. 1976) 8

Rowlett v. Anheuser-Busch, Inc., 832 F.2d 194 (1st Cir. 1987) 6

Russ v. Standard Ins. Co., 120 F.3d 988 (9th Cir. 1997) 7

Rutledge v. Electric Hose & Rubber Company, 511 F.2d 668 (9th Cir. 1975) 6

Sullivan v. School Board of Pinellas County, 773 F.2d 1182 (11th Cir. 1985) 10

Swofford v. B. & W., Inc., 336 F.2d 406 (5th Cir. 1964) 6

TABLE OF AUTHORITIES – Continued

Page

Thompson v. Fritsch, 172 F.R.D. 269 (D.C. Mich. 1997) 7

Tomlin v. Pope & Talbot, Inc., 282 F.2d 447 (9th Cir. 1960) 6

Truesdell v. State Farm Fire and Cas. Co., 960 F.Supp. 1511 (D.C. Okl. 1997) 7

U.S. v. Provencio, 554 F.2d 361 (9th Cir. 1977) 8

White v. White, 925 F.2d 287 (9th Cir. 1991) 8

Wise v. Lanham, 171 F.R.D. 187 (D.C. Md. 1997) 7

CONSTITUTIONAL PROVISIONS

Amendment VII, Constitution of the United States 2, 5, 10, 11

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 4

28 U.S.C. § 1332 4

28 U.S.C. § 2403(a) 1

FEDERAL RULES OF CIVIL PROCEDURE

Rule 5(d) 2

Rule 9(h) 3

Rule 29 para. 4(b) 1

Rule 38 ..... 3, 9

Rule 38(d) 4, 5, 7, 10

TABLE OF AUTHORITIES – Continued

Page

Rule 39 9

Rule 39(b) ..... *passim*

TREATISES

Wright & Miller, Federal Practice and Procedure: Civil 2d § 2334, P.189 9

LAW REVIEW ARTICLES

Comment, Discretion of Court to Set Aside Waiver of Jury Trial Under Federal Rule 39(b), 47 Iowa Law Review 759 (1962) 9

OTHER

Alexander Hamilton, The Federalist, No. LXXXIII, P. 139 10

CITATION OF OPINIONS BELOW

Demasse v. ITT Corp., 915 F.Supp. 1040 (D. Ariz. 1996)

Demasse v. ITT Corp., 111 F.3d 730 (9th Cir. 1997)

Demasse v. ITT Corp., ___ Ariz. ___, ___ P.3d ___ (1999)

BASIS FOR JURISDICTION IN THIS COURT

The judgment of the United States Court of Appeals for the Ninth Circuit, which is the subject of this Petition, was entered on June 9, 1999 and affirmed the District Court's denial of Petitioners' demand for a jury trial. This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals by *writ of certiorari* pursuant to 28 U.S.C. § 1254(1).

Because the constitutionality of an act of Congress is at issue here, 28 U.S.C. § 2403(a) may apply. Accordingly, pursuant to Supreme Court Rule 29, para. 4(b), this Petition has been served on the Solicitor General of the United States.

Neither the U.S. District Court for the District of Arizona nor the U.S. Court of Appeals for the Ninth Circuit has certified to the Attorney General, pursuant to 28 U.S.C. § 2403(a), that the Constitutionality of an Act of Congress has been drawn into question.

CONSTITUTIONAL PROVISION AND RULES INVOLVED IN THE CASE

Civil Trials

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment VII, Constitution of the United States

Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by (1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue, and (2) filing the demand as required by Rule 5(d). Such demand may be indorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In the demand, a party may specify the issues which the party wishes so tried; otherwise, the party shall be deemed to have demanded trial by jury for all the issues so triable. If the party has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial

by jury of any other or all of the issues of fact in the action.

(d) **Waiver.** The failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) **Admiralty and Maritime Claims.** These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 39. Trial by Jury or by the Court

(a) **By Jury.** When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

(b) **By the Court.** Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

(c) **Advisory Jury and Trial by Consent.** In all actions not triable of right by a jury, the court,

> upon motion or of its own initiative, may try any issue with an advisory jury or, except in actions against the United States when a statute of the United States provides for trial without a jury, the court, with the consent of both parties may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.
>
> *Federal Rules of Civil Procedure*

STATEMENT OF THE CASE

This is an action initially brought in the U.S. District Court for the District of Arizona, based on diversity of citizenship and an amount in controversy exceeding $50,000, pursuant to 28 U.S.C. § 1332. Petitioners' action for damages was based upon breach of an implied-in-fact contract created by promises made in an employees' handbook that layoff and recall decisions would be based upon seniority. Due to inadvertence, Petitioners failed to demand a jury trial within the time limits provided by Rule 38(d). Upon discovery of the oversight, Petitioners filed a motion for relief in accordance with the provisions of Rule 39(b) F.R.C.P. **(Appx. A)** The U.S. District Court below, in its order dated March 9, 1995, denied Plaintiffs' request for a jury trial. **(Appx. B)**

The U.S. District Court granted Respondent's Motion for Summary Judgment. Petitioner filed a timely appeal, including an appeal of the denial of the request for trial by jury, to the Ninth Circuit Court of Appeals, which had jurisdiction based upon 28 U.S.C. § 1291. The Ninth Circuit certified certain questions of law to the Arizona

Supreme Court, which filed its answer to the certified questions on May 25, 1999. On June 9, 1999, the Ninth Circuit, in an unpublished order, reversed the judgment of the U.S. District Court on the substantive issues, but affirmed the U.S. District Court's denial of Petitioners' demand for a jury trial. **(Appx. C)**

REASONS FOR GRANTING THE WRIT

This case involves the Constitutionality of the waiver provisions of Rule 38(d) and the "judicial discretion" standard of Rule 39(b) of the Federal Rules of Civil Procedure. The Circuits are now so hopelessly divided in interpreting Rule 39(b) that citizens are being denied their Seventh Amendment right to a trial by jury based upon nothing more than the fortuitous circumstance of their geographical location.

The Court should accept this case to establish uniform guidelines for the Federal Circuits and lower courts in interpreting Rule 39(b) of the Federal Rules of Civil Procedure, guidelines that would strike a balance between the interests of preserving and protecting the Constitutional rights of litigants and preventing any potential prejudice that a late request for a jury trial might bring to other parties or to the Court's schedule. This case presents a unique opportunity for this Court to bring uniformity to this issue and elevate the rights provided by the Seventh Amendment to a status equal to other Constitutional rights that cannot be inadvertently waived.

I. The decisions of the various circuits are in conflict regarding the standard for granting relief under Rule 39(b).

Courts in the First, Fifth, Seventh, and Tenth Circuits interpret Rule 39(b) to require the exercise of discretion in favor of a trial by jury unless significant prejudice to other parties or to the Court is shown. *Lewis v. Thigpen*, 767 F.2d 252, 259 (5th Cir. 1985); *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Swofford v. B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964); *AMF Tuboscope, Inc. v. Cunningham*, 352 F.2d 150, 155 (10th Cir. 1965); *Merritt v. Faulkener*, 697 F.2d 761 (7th Cir. 1983); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Kotsilieris v. Chalmers*, 966 F.2d 1181, 1187 (7th Cir. 1992).

On the other hand, the Second, Fourth, and Ninth Circuits cling tenaciously to a policy of denying Rule 39(b) motions for an inadvertent late filing unless compelling special circumstances are shown. *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Lewis v. Time, Inc.*, 710 F.2d 549, 556 (9th Cir. 1983); *Mardesich v. Marciel*, 538 F.2d 848, 849 (9th Cir. 1976); *Pacific Queen Fisheries v. Symes*, 307 F.2d 700, 718-19 (9th Cir. 1962); *Rutledge v. Electric Hose & Rubber Company*, 511 F.2d 668, 675 (9th Cir. 1975); *Tomlin v. Pope & Talbot, Inc.*, 282 F.2d 447, 449 (9th Cir. 1960); *Beckham v. Safeco Ins. Co.*, 691 F.2d 898 (9th Cir. 1982); *Noonan v. Cunard S.S. Co.*, 375 F.2d 69, 70 (2nd Cir. 1967); *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 393 (2nd Cir. 1983); *General Tire and Rubber Co. v. Watkins*, 331 F.2d 192, 197-198 (4th Cir. 1964). In the Ninth Circuit, denial of one's right to trial by jury when there has been a late request due to inadvertence is so

rigidly enforced that no discretion is permitted. *Russ v. Standard Ins. Co.*, 120 F.3d 988 (9th Cir. 1997).

Similarly, U.S. District Courts in the respective circuits have taken divergent positions, either interpreting Rule 39(b) in a manner granting a trial by jury, *Milliken and Co. v. Shaw Indus., Inc.*, 978 F.Supp. 1155 (D.C. Ga. 1997); *Truesdell v. State Farm Fire and Cas. Co.*, 960 F.Supp. 1511 (D.C. Okl. 1997); *Thompson v. Fritsch*, 172 F.R.D. 269 (D.C. Mich. 1997); *Goff v. Owen Healthcare, Inc.*, 166 F.R.D. 492 (D.C. Kan. 1966); *Credit Bureau of Council Bluffs v. Credit Bureau Data Centers, Inc.*, 143 F.R.D. 206 (Iowa, 1992); *E.E.O.C. v. Britrail Travel Int'l Corp.*, 129 F.R.D. 116 (D.C. N.J. 1989); *Ford v. Breier*, 71 F.R.D. 195 (D.C. Wis. 1976); *Megadyme Medical Prods. v. Aaron Medical Indus.*, 170 F.R.D. 28 (D.C. Utah 1996), or routinely denying such requests, unless there are compelling reasons to grant it. *Wise v. Lanham*, 171 F.R.D. 187 (D.C. Md. 1997); *Gelardi v. TransAmerica Occidental Life Insurance Co.*, 163 F.R.D. 495, 496 (D.C. Va. 1995); *Baker v. Amtrak Corp.*, 163 F.R.D. 219 (D.C. N.Y. 1995); *Gamboa v. Medical College of Hampton Roads*, 160 F.R.D. 540 (D.C. Va. 1995).

II. The waiver of a Constitutional right should be a knowledgeable waiver and not an unintentional or inadvertent one.

Rule 38(d) F.R.C.P., in its present form, permits an unintentional waiver of the Seventh Amendment right to trial by jury. It is for this reason that Rule 39(b), F.R.C.P. should be interpreted, whenever possible, to restore one's Constitutional right where an inadvertent waiver has occurred. Although any Constitutional right may be

waived, a waiver of such a fundamental right should be based upon a *knowledgeable* waiver and not an unintentional or inadvertent one. *Patterson v. Illinois*, 487 U.S. 285, 108 S.Ct. 2389, 2395-96, 101 L.Ed.2d 261 (1988); *Johnson v. Zerbst*, 304 U.S. 458, 464, 465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *Faretta v. California*, 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed. 2d 562 (1975); *Edwards v. Arizona*, 451 U.S. 477, 483-485, 101 S.Ct. 1880, 1884-85, 68 L.Ed. 2d 378 (1981); *Fuentes v. Shevin*, 407 U.S. 67, 95, 92, S.Ct. 1983, 2002, 32 L.Ed. 2d 556 (1972); *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 92 S.Ct. 775, 782, 31 L.Ed. 2d 124 (1972); *White v. White*, 925 F.2d 287 (9th Cir. 1991); *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987); *Davis Oil Co. v. Mills*, 873 F.2d 774, 787, 788 (5th Cir. 1989); *Erie Telecommunications, Inc. v. City of Erie, Pennsylvania*, 853 F.2d 1084, 1095 (3rd Cir. 1988).

III. A waiver of a Constitutional right must be by clear and compelling evidence.

Waivers of Constitutional rights are not favored. The courts have almost uniformly declared that a waiver of a Constitutional right must be established by "clear" and "compelling" evidence. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145, 87 S.Ct. 1975, 1986, 18 L.Ed. 2d 1094 (1967); *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1007 & n.14 (3rd Cir. 1976); *Miranda v. State of Arizona*, 86 S.Ct. 1602, 384 U.S. 436, 475, 16 L.Ed. 2d 694 (1966); *U.S. v. Provencio*, 554 F.2d 361 (9th Cir. 1977). Outside of those cases interpreting Rule 39(b) F.R.C.P., one is hard pressed to find any authority for the proposition that any other

Constitutional right can be waived by oversight or inadvertence.

IV. Rule 39(b), when reasonably construed, can prevent inadvertent waivers.

If reasonably construed, Rule 39(b) F.R.C.P., can operate as an important safeguard against an irretrievable, inadvertent waiver of the right to trial by jury. The better-reasoned cases and other legal authorities, recognize the beneficent purposes of Rule 39(b) and have taken pains to preserve the benefits of this important Constitutional right, unless the delay results in prejudice to other parties or to the administrative scheduling concerns of the court. *Lewis v. Thigpen, supra; AMF Tuboscope Inc., v. Cunningham, supra; Merritt v. Faulkener, supra; Wright & Miller,* Federal Practice and Procedure: Civil 2d § 2334, P.189; *Comment, Discretion of Court to Set Aside Waiver of Jury Trial Under Federal Rule 39(b),* 47 Iowa Law Review 759 (1962). Similarly, the decisions of state courts which have rules similar to Rule 38 and Rule 39 of the F.R.C.P., have supported the right to trial by jury where there is a doubt as to whether a waiver is intended. *Loiselle v. Gladfelter,* 160 So.2d 740, 740 (Fla. 1964); *Patterson v. McNeill – Patterson & Assoc., Inc.,* 441 S.E.2d 328, 329 (S.C. App. 1994); *REW Construction Co., v. District Court of Third Judicial Dist.,* 400 P.2d 390, 401 (Idaho 1965).

The interpretation of Rule 39(b) prevailing in the First, Fifth, Seventh, and Tenth Circuits is consistent with preserving the Constitutional right of trial by jury and provides protection against a waiver of one's rights due to oversight, inadvertence, or neglect. Such a policy is

consistent with elevating the Constitution and the preservation of our Constitutional rights, whereas the contrary policy prevailing in the Second, Fourth, and Ninth Circuits diminishes our Constitution by relegating it to a position subservient to the Federal Rules of Civil Procedure without any equivalent, countervailing benefit. Taken to its logical (or illogical) extreme, the legislative or judicial branches could similarly achieve the inadvertent waiver of other valuable Constitutional rights simply by the enactment of waiver provisions in legislative acts or in court rules, a process that would entirely undermine the principles of Constitutional supremacy.

The Seventh Amendment is an integral part of our Bill of Rights and was thought by our Founding Fathers to be essential to the preservation of our freedoms and a shield against tyranny. *Alexander Hamilton, The Federalist,* No. LXXXIII, P.139. The right of our citizens to trial by jury should occupy a far higher level than suggested in the decisions of our courts which so narrowly construe Rule 39(b).

V. Uniform guidelines for Rule 39(b) should be established by this Court.

The Eleventh Circuit steers a middle course between those circuits which either favor or oppose granting relief where, thru inadvertence, there is a late request for a jury trial. *Parrott v. Wilson,* 707 F.2d 1262 (1983); *Sullivan v. School Board of Pinellas County,* 773 F.2d 1182 (11th Cir. 1985). Five helpful guidelines have been developed by the Eleventh Circuit for lower courts to follow in exercising their discretion under Rule 39(b). They are:

1. Whether the case involves issues traditionally tried by a jury;

2. Whether granting the motion would disrupt the Court's or the adverse parties' schedule;

3. Whether the adverse party will be prejudiced;

4. How long the moving party delayed in bringing the motion.

5. Why the moving party failed to file a timely demand for a jury trial.

Similarly, uniform guidelines should be adopted by this Court for the guidance of lower courts in acting upon Rule 39(b) requests, so that the Constitutional rights of litigants will not fortuitously depend upon the Circuit or Judicial District in which one happens to be.

CONCLUSION

Although most litigants take their Seventh Amendment right to trial by jury for granted, it can easily be lost under the policies adopted by the Second, Fourth, and Ninth Circuits in their interpretation of Rule 39(b). Many *pro se* litigants are, presumably, totally unaware of the waiver provisions of Rule 38(d). In addition, many lawyers who practice predominately in state courts, whose rules require an affirmative act before waiver of a jury trial can occur, may also be largely unaware of the waiver provisions of Rule 38(d), or may not have it sufficiently in mind during their occasional appearance in Federal Court to file a timely request.

Absent the most compelling circumstances, this Court should interpret Rule 39(b) in a manner that would preserve one's Seventh Amendment rights. To the extent that the rigid approach of the Second, Fourth, and Ninth Circuits deprives our citizens of their Constitutional right to trial by jury, such approach should be modified by this Court. Rights secured by the Seventh Amendment should not be easily lost through ignorance or inadvertence nor should their restoration be made dependent upon judicial discretion without clear and uniform guidelines in support of such restoration.

RESPECTFULLY SUBMITTED this 28th day of July 1999.

ADAM LEVINE
Counsel of Record
DANIEL MARKS
302 E. Carson, #702
Las Vegas, Nevada 89101
(702) 386-0536

JACK LEVINE
1144 East Jefferson Street
Phoenix, Arizona 85034
(602) 254-6044

APPENDIX

Page

A. ORDER REVERSING THE JUDGMENT OF THE DISTRICT COURT; DENYING ITT'S REQUEST FOR ATTORNEY'S FEES INCURRED ON APPEAL; AND AFFIRMING THE DISTRICT COURT'S DENIAL OF THE EMPLOYEES' UNTIMELY DEMAND FOR A JURY TRIAL.... A-1

B. MOTION FOR LEAVE TO REQUEST TRIAL BY JURY..... A-3

C. ORDER DENYING PLAINTIFFS' REQUEST FOR TRIAL BY JURY..... A-5

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROGER DEMASSE; MARIA A. GARCIA; BILLY W. JONES; VIOLA MUNGUIA; GREG PALMER; SOCORRO SOZA, Plaintiffs-Appellants, v. ITT CORPORATION, a Delaware Corporation dba ITT CANNON, Defendant-Appellee.	No. 96-15520 D.C. No. CV-94-01399-ROS ORDER (Filed Jun. 9, 1999)

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Argued March 10, 1997
Submitted June 4, 1999
San Francisco, California

Before: WHITE, Associate Justice, Retired;* CANBY and RYMER, Circuit Judges.

This case is submitted as of June 4, 1999.

By order of April 17, 1997 we certified two questions to the Arizona Supreme Court. The Arizona Supreme Court filed an opinion May 25, 1999 answering the two

---

* The Honorable Byron R. White, Associate Justice of the United States Supreme Court (Ret.), sitting by designation.

certified questions in the negative. Therefore, we reverse the judgment of the district court and remand for further proceedings not inconsistent with the Arizona Supreme Court's opinion; we deny ITT's request for attorneys' fees incurred on appeal; and we affirm the district court's denial of the employees' untimely demand for a jury trial.

REVERSED AND REMANDED IN PART; AFFIRMED IN PART.

APPENDIX B

Jack Levine, Esq.
State Bar No. 001637
1144 East Jefferson
Phoenix, Arizona 85034
254-6044
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

BETTY L. ALLEN, MARGARET VIDAURE and NGOC THI WIDDOWSON, Plaintiffs, vs. INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware corporation dba ITT CANNON Defendant.	No. CIV 94-0267 PHX RGS MOTION FOR LEAVE TO REQUEST TRIAL BY JURY

COMES NOW the Plaintiffs, by and through their undersigned attorney, and moves the Court for its Order granting leave to file a Demand for Trial by Jury in the above-entitled matter. This Motion is based upon Rule 38 of the Federal Rules of Civil Procedure and is supported by the Memorandum of Points and Authorities set forth hereinbelow:

MEMORANDUM OF POINTS AND AUTHORITIES

This action when it was initially filed was a part of a combined action with numerous other parties, which action was subsequently severed into three separate actions. Because of the Defendant's Motion to Sever and the resultant delay in filing an Answer until many months after the Complaint was filed, the Plaintiffs neglected to file a demand for a jury trial at that time. The failure to file a jury demand was an inadvertent one and the Plaintiffs desire to have the issues herein decided by a jury. It is submitted that the Defendant has not and will not suffer any prejudice as a result of this request.

Accordingly, Plaintiffs' request that the Court grant Plaintiffs leave to file a demand for a jury trial in the above matter.

RESPECTFULLY SUBMITTED this 21st day of November, 1994.

/s/ Jack Levine
Jack Levine
1144 E. Jefferson
Phoenix, Arizona 85034
Attorney for Plaintiffs

COPY of the foregoing mailed
this 21st day of November, 1994
to:

Teresa D. Forst, Esq.
BRYAN CAVE
2800 North Central Avenue
21st Floor
Phoenix, Arizona 85004
Attorney for Defendant

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROGER DEMASSE, MARIA A. GARCIA, BILLY W. JONES, VOILA [sic] MUNGUIA, GREG PALMER, and SOCORRO SOZA, Plaintiffs, vs. INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, a Delaware corporation d/b/a ITT CANON, Defendant.	No. CIV 94-1399 PHX ROS **ORDER** (Filed March 9, 1995)

On February 3, 1994, Plaintiffs Betty L. Allen, Margaret Vidaure, Ngoc Thi Widdowson, Roger Demasse, Maria A. Garcia, Billy W. Jones, Viola Munguia, Greg Palmer, Socorro Soza and Joseph W. Sullivan filed a Complaint with this Court alleging breach of contract. On February 23, 1994 Defendant International Telephone and Telegraph (ITT) filed a motion to sever the action into three lawsuits. ITT proposed that the first lawsuit include Plaintiffs Allen, Vidaure and Widdowson. The second lawsuit was proposed to include Plaintiffs Demasse, Munguia, Palmer, Soza, Jones and Garcia. Sullivan was to be the sole Plaintiff in the third lawsuit. This motion was

granted by a minute entry dated May 16, 1994. A written order was issued on July 14, 1994 confirming the minute entry. The instant case is the first lawsuit, which retained the original case number. The lawsuit involving the Demasse Plaintiffs was renumbered CIV 94-1399. The Answer in CIV 94-267 was filed on July 8, 1994. There is no date on the Answer filed in CIV 94-1399. On November 21, 1994, Plaintiffs filed a Motion for Leave to Request Trial by Jury in both cases. Plaintiffs cite inadvertence as the cause of their failure to file a jury demand.[1] For the reasons set forth below, the Court finds that the Plaintiffs are not entitled to a jury trial in either case.

THE LAW

Rule 38(b) of the Federal Rules of Civil Procedure provides that any party may demand a trial by jury of any issue "triable of right by a jury" by serving a written

---

[1] To support his claim of inadvertence, counsel for the plaintiffs, Jack Levine, filed an affidavit in which he stated that he "had not practiced in the U. S. District Court for at least twenty years before [filing the complaint in this action]." The Court independently determined that Mr. Levine was counsel in approximately eight actions brought in Federal District Court for the District of Arizona in 1993 and 1994 and that in *Miller v. State Farm Ins. Co.*, CIV 94-0399 PHX PGR as plaintiffs' counsel he filed on February 18, 1994 a demand for a jury trial. In light of this discovery the Court was extremely troubled by Mr. Levine's seemingly clear and unequivocal denial of involvement or association with federal court cases for "twenty years." Mr. Levine's explanation at the hearing on this motion, though evincing recklessness, extremely poor judgment and incompetence did not appear to the court to be an intentional false statement made under oath.

demand upon the other party not later than ten days after service "of the last pleading directed to such issue." Rule 38(d) provides that failure to serve a demand as required by Rule 38(b) "constitutes waiver by the party of trial by jury." Clearly, Plaintiffs did not serve their demand within ten days of the date Defendant filed its Answer, the last pleading directed to the issues in this case.

Rule 39(b) of the Federal Rules of Civil Procedure provides in relevant part:

> [N]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any and all issues.

Although a district court has discretion to order a jury trial upon a motion by a party that has not timely filed a demand for one, in the Ninth Circuit that discretion does not permit a district court to grant relief where the failure to timely file a demand is the result of "oversight" or "inadvertence." *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 477 (9th Cir. 1994); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984); *Lewis v. Time Inc.*, 710 F.2d 549, 557 (9th Cir. 1983).

Plaintiffs cite several cases from other circuits which hold that motions under Rule 39(b) should be granted unless they will result in prejudice, delay or waste of judicial resources. *See, Sullivan v. School board of Pinellas County*, 773 F.2d 1182 (8th Cir. 1985); *Pinemont Bank v. Belk*, 722 F.2d 232 (5th Cir. 1984); *Merritt v. Faulkener*, 697 F.2d 761 (7th Cir. 1983) *cert. denied* 464 U.S. 986 (1983); *Littlefield v. Fort Dodge Messinger*, 614 F.2d 581 (8th Cir.

1980) *cert. denied* 445 U.S. 945 (1980); *Swofford v. B & W, Inc.*, 336 F.2d 406 (5th Cir. 1964) *cert. denied* 379 U.S. 962 (1965); *Tavoulareas v. Piro*, 93 F.R.D. 11 (D.D.C. 1981); *Davis-Watkins Co. v. Service Merchandise Co.*, 500 F. Supp. 1244 (9th Cir. 1982) *aff'd* 686 F.2d 1190 (6th Cir. 1982). However, different circuits have different rules. "It is the rule in some courts that 'the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.' Elsewhere, the judicial attitude is almost diametrically the opposite. Thus, it has been held that a court has no discretion to grant a jury trial when there was no timely demand unless there are special circumstances excusing the oversight or default." Wright & Miller, Federal Practice & Procedure: Civil 2d § 2334 (1995) (citations omitted). Clearly, the circuits that the Plaintiffs cite fall closer to the former category and the Ninth Circuit falls closer to the latter category. Thus, the Plaintiffs' citations are neither controlling or persuasive.

THE FACTS

In their Motion for Leave to Request Trial by Jury, Plaintiffs state that they neglected to file a demand for jury trial because the Defendant's Motion to sever delayed the filing of the Answer until many months after the Complaint was filed. They characterize the failure to demand a jury trial as "inadvertent." Under Ninth Circuit law, this Court does not have discretion to grant a jury trial after the period specified under Rule 38(b) when the delay is due to inadvertence or inexcusable neglect. *Craig*, 19 F.3d at 477; *Blau*, 748 F.2d at 1357; *Lewis*, 710 F.2d at 557

In their reply, the Plaintiffs provide more details about their failure to demand a jury trial. They say that Plaintiffs' counsel's lack of familiarity with federal court "may" have led to the delayed realization that a demand should have been filed earlier. However, the Ninth Circuit has upheld the denial of trial by jury on the grounds that the attorney was not certified to practice in federal court and mistakenly thought that no demand was necessary under Rule 81(c). *Beckham v. Safeco Ins. Co. of America*, 691 F.2d 898 (9th Cir. 1982).

Plaintiffs also argue that the confusion created by the severance of the case into three separate cases contributed to the failure to file the demand. This is also no more than inadvertence, especially when the demand could have been made in the Complaint. In addition, Plaintiffs state that, when they stipulated to a delay in filing the answer, the answer was not attached to the stipulation as the stipulation required. It is unclear how this assists the Plaintiffs.

Plaintiffs also argue that the late request should be excused because it was caused by the fact that a new secretary filed the Answers without showing them to counsel, and, furthermore, filed them in the wrong place. Because the Court finds that counsel's secretary's errors constitute nothing more than "oversight" and "inadvertence," this argument is of no avail to the Plaintiffs.

Plaintiffs also argue that Plaintiffs' counsel may have lost track of the pleadings because of the severance of the cases and the resultant multiplicity of pleadings. However, the fact that the lawyer was swamped with work is

not an adequate excuse. *Chandler Supply Co. v. GAF Corp.*, 650 F.2d 983, 987-88 (9th Cir. 1980).

The Plaintiffs do not claim that their Motion for Leave to Request a Jury Trial should be granted because the time between the deadline in Rule 38(b) and their Motion is short, but the Defendants note that the Ninth Circuit has held that the District Court did not abuse its discretion in refusing to allow untimely jury demands when the demand was late by two months, *Blau* 748 at 1357, or four months, *Beckham v. Safeco Ins Co.*, 691 F.2d 898 (9th Cir. 1982). In the instant case the demand is five months late.

Accordingly,

IT IS ORDERED denying Plaintiffs' Request for Jury Trial (Doc. 38).

DATED this 9 day of March, 1995.

/s/ Roslyn O. Silver
Roslyn O. Silver
United States
District Judge

copies to all counsel of record